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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JORDAN LOPEZ,

Defendant and Appellant.

B297119

(Los Angeles County
Super. Ct. No. SA070283)

APPEAL from an order of the Superior Court of
Los Angeles County, Kathryn A. Solorzano, Judge. Affirmed.

Robert Derham, under appointment by the Court of Appeal,
for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters,
Chief Assistant Attorney General, Susan Sullivan Pithey, Acting
Assistant Attorney General, Amanda V. Lopez and Michael C.
Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jordan Lopez challenges the trial court's denial of his petition for resentencing under Penal Code section 1170.95.¹ The trial court found that Lopez was ineligible for relief because he pleaded no contest to attempted murder, and the statute allows for resentencing only of those convicted of murder. We agree and thus affirm.

FACTS AND PROCEEDINGS BELOW

In 2010, Lopez pleaded no contest to one count of attempted murder, in violation of sections 187 and 664. He admitted that he committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)), and that a principal used a firearm in the commission of the offense. (§ 12022.53, subds. (c) & (e).) The trial court imposed a sentence of 29 years in prison, consisting of the high term of nine years for attempted murder, plus 20 years for the firearm enhancement.

We described the facts of the case in an earlier opinion in which we affirmed Lopez's conviction and denied his habeas petition: "On February 3, 2009, around noon, Joel Becerra's car was parked on Venice Boulevard near Cattaraugus. Becerra was removing items from the trunk of his car, and he noticed two young men near the corner looking at him. One of the men, later identified as Hansel Machuca, was wearing a dark-colored hoodie; the other man, later identified as [Lopez], was taller and not wearing a hoodie. After a few moments, the man in the hoodie, Machuca, approached Becerra. Machuca asked Becerra for his gang affiliation. Becerra responded that he did not belong to a gang, and Machuca pulled out a black gun. Becerra ran

¹ Unless otherwise specified, subsequent statutory references are to the Penal Code.

across Venice Boulevard in an attempt to escape, and he heard two shots. One went through his chest. Becerra did not get a good look at the person who shot him.” (*People v. Lopez* (Sept. 29, 2011, B225481) [nonpub. opn.].)

In 2018, the Legislature enacted Senate Bill No. 1437 (2017–2018 Reg. Sess.), which eliminated liability for murder under the natural and probable consequences doctrine. (*People v. Lopez* (2019) 38 Cal.App.5th 1087, 1092–1093 (*Lopez*), review granted Nov. 13, 2019, S258175.) The legislation also enacted section 1170.95, which establishes a procedure for vacating murder convictions that were based upon the natural and probable consequences doctrine and resentencing those who were so convicted. (Stats. 2018, ch. 1015, § 4, pp. 6675–6677.)

In January 2019, Lopez filed a petition in the superior court for resentencing under section 1170.95. At a hearing on March 11, 2019, the trial court summarily denied Lopez’s petition on the ground that “Senate Bill [No.] 1437 does not apply to attempted murder.”

DISCUSSION

Lopez contends that the trial court erred in denying his petition. He argues that interpreting section 1170.95 as applying to murder but not attempted murder is irrational, contrary to the Legislature’s intent, and a violation of the state constitutional prohibition against cruel or unusual punishment. He also contends that, to the extent the text of the law is ambiguous, the rule of lenity requires us to construe it in his favor. We find no merit in these arguments.

The natural and probable consequences doctrine provides that “‘[a] person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of

any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime.’” (*People v. Medina* (2009) 46 Cal.4th 913, 920.) “‘By its very nature, aider and abettor culpability under the natural and probable consequences doctrine is not premised upon the intention of the aider and abettor to commit the nontarget offense because the nontarget offense was not intended at all. It imposes vicarious liability for any offense committed by the direct perpetrator that is a natural and probable consequence of the target offense.’” (*People v. Chiu* (2014) 59 Cal.4th 155, 164.)

The Legislature enacted Senate Bill No. 1437 “to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.” (Stats. 2018, ch. 1015, § 1(f), p. 6674; see *People v. Martinez* (2019) 31 Cal.App.5th 719, 723.) The legislation amended section 188 to require that “in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.” (§ 188, subd. (a)(3); Stats. 2018, ch. 1015, § 2, p. 6675; *In re R.G.* (2019) 35 Cal.App.5th 141, 144.)² As a result, the natural and probable consequences doctrine can no longer be used to support a murder

² The new law also amended section 189 by adding a requirement to the felony-murder rule that a defendant who was not the actual killer or a direct aider and abettor must have been a “major participant” in the underlying felony who acted with reckless indifference to human life. (Stats. 2018, ch. 1015, § 3, p. 6675.) This aspect of the new law is not relevant here.

conviction. (*Lopez, supra*, 38 Cal.App.5th at p. 1103 & fn. 9; Stats. 2018, ch. 1015, § 1(f), p. 6674.)

The legislation also enacted section 1170.95 to allow those previously convicted of murder under a natural and probable consequences theory to petition the court to have their murder convictions vacated and to be resentenced. (§ 1170.95, subds. (a) & (e); Stats. 2018, ch. 1015, § 4, pp. 6675–6677.) A petitioner is eligible for resentencing if three conditions apply: (1) A charging document “was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine[;] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea . . . ; [and] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189” made by Senate Bill No. 1437. (§ 1170.95, subd. (a).)

Lopez is ineligible for relief under the plain text of section 1170.95 because he fails to meet the second of these three requirements: He was not convicted of first or second degree murder. Although they are closely related, “[m]urder and attempted murder are separate crimes.” (*Lopez, supra*, 38 Cal.App.5th at p. 1109, citing *People v. Marinelli* (2014) 225 Cal.App.4th 1, 5 “[i]t is well established that ‘[a]n attempt is an offense ‘separate’ and ‘distinct’ from the completed crime’ ”).)

The remainder of the text of Senate Bill No. 1437 confirms that the limitation of section 1170.95 was not an oversight—the Legislature intended the law to apply exclusively to cases of murder. The law states that “[t]here is a need for statutory changes to more equitably sentence offenders in accordance with their involvement in *homicides*.” (Stats. 2018, ch. 1015, § 1(b),

p. 6674, italics added.) The Legislature acted “to ensure that *murder* liability is not imposed on a person who is not the actual *killer*, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.” (Stats. 2018, ch. 1015, § 1(f), p. 6674, italics added.) This is not a situation where “ ‘resolution of the statute’s ambiguities in a convincing manner is impracticable,’ ” and we must apply the rule of lenity to interpret the law in the defendant’s favor. (*People v. Avery* (2002) 27 Cal.4th 49, 58.) We agree with every court that has considered the question and hold that defendants convicted of attempted murder are ineligible for relief under section 1170.95. (See *Lopez, supra*, 38 Cal.App.5th at pp. 1104–1105; *People v. Munoz* (2019) 39 Cal.App.5th 738, 754–755; *People v. Medrano* (2019) 42 Cal.App.5th 1001, 1016-1018; *People v. Larios* (2019) 42 Cal.App.5th 956, 968–969.)

Lopez argues that our interpretation of section 1170.95 is incorrect because it would yield an irrational result in which defendants convicted of murder are punished less severely than those convicted of attempted murder. He relies on *People v. King* (1993) 5 Cal.4th 59, in which our Supreme Court held that laws providing a benefit to juvenile defendants convicted of murder must be interpreted as providing the same benefit to attempted murderers, even though the literal text of the statutes indicates otherwise. (*Id.* at pp. 69–70.) The Court cited the principle that “ ‘language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.’ ” (*Id.* at p. 69.) But as the court noted in *Lopez*, the anomalous sentencing provisions in *King* occurred because a series of unrelated statutes and Supreme Court decisions worked together in a way the Legislature had not

considered. (See *Lopez, supra*, 38 Cal.App.5th at pp. 1106–1107.) “Here, in contrast, we are not dealing with amendments of different statutes in separate codes at different times leading to an unintended result, but a single piece of legislation in which the Legislature unequivocally elected, both in the words it chose and its statement of purpose, to provide a benefit to one category of aiders and abettors prosecuted under the natural and probable consequences doctrine—those facing the lengthiest prison sentences—and not to others.” (*Id.* at p. 1107.)

Lopez also contends that *People v. Barrajas* (1998) 62 Cal.App.4th 926 supports his position. In that case, the court held that section 1000, which allows defendants convicted of certain drug offenses to enter a diversion program, also applies to those convicted of attempting to commit a predicate offense, even though the statute made no provision for attempts. (*People v. Barrajas, supra*, at p. 929 & fn. 3.) But section 1000 applies to several different offenses, most of which involve the simple possession or use of illegal drugs. (See § 1000, subd. (a).) It is not difficult to imagine that the Legislature would neglect to consider and separately provide for the attempt to commit those offenses. Section 1170.95, by contrast, involves a single offense, murder. When the Legislature means for a law to apply to attempted murder, it explicitly says so in the text of a statute. (See, e.g., § 246.1, subd. (a) [law requiring forfeiture of a vehicle used in a crime applies to attempted murder], § 667.5, subd. (c)(12) [defining attempted murder as a violent felony], § 2932, subd. (a)(1) [loss of credit for good behavior for committing attempted murder in prison].)

Nor is the Legislature’s exclusion of attempted murderers from the benefits of section 1170.95 irrational. As the court

explained in *Lopez*, “the gap between a defendant’s culpability in aiding and abetting the target offense and the culpability ordinarily required to convict on the nontarget offense is greater in cases where the nontarget offense is murder, than where the nontarget offense is attempted murder or, in the prosecutor’s discretion, aggravated assault. The Legislature could have reasonably concluded reform in murder cases ‘was more crucial or imperative.’” (*Lopez, supra*, 38 Cal.App.5th at p. 1112.) Given the limited resources available for handling resentencing cases, the Legislature may have decided to make relief available only to murder cases. (See *ibid.*)

Finally, *Lopez* argues that the exclusion of attempted murder from eligibility for relief under section 1170.95 violates the state constitutional prohibition against “[c]ruel or unusual punishment.” (Cal. Const., art. I, § 17.) He relies on *People v. Schueren* (1973) 10 Cal.3d 553 (*Schueren*), in which our Supreme Court held that imposing a longer sentence on a defendant convicted of a lesser included offense than he would have received if he had been found guilty as charged constituted unusual punishment under article I, section 17. (See *Schueren, supra*, at pp. 559–560.) But *Schueren* does not apply to the denial of postconviction relief. As the court in *People v. Smith* (2015) 234 Cal.App.4th 1460 explained when affirming the denial of a petition for resentencing under Proposition 36, “[u]nder the laws then in effect, defendant received a valid indeterminate sentence. There was nothing unusual about his sentence, as it was not one ‘that in the ordinary course of events is not inflicted.’” (*People v. Smith, supra*, at pp. 1468–1469.) The Legislature’s passage of a law making a procedure for resentencing available to other defendants that is not available to *Lopez* “does not

retroactively convert defendant's otherwise lawful sentence into a constitutionally 'unusual' one under *Schueren*." (*Id.* at p. 1469.)

DISPOSITION

The trial court's order is affirmed.

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ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.